

**STATE OF NEW YORK
UNIFIED COURT SYSTEM**

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**REPORT ON THE NEW YORK STATE UNIFIED COURT
SYSTEM FILING BY ELECTRONIC MEANS AND FILING BY
FACSIMILE TRANSMISSION PILOT PROGRAMS PURSUANT
TO CHAPTER 367 OF THE LAWS OF 1999**

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Part 1:

Report on the New York State Unified Court System Filing By Electronic Means Pilot

I. Introduction

Perhaps no societal phenomenon has had a greater positive impact on the New York State courts over the last decade than the advance of technology. Innovations that seem so commonplace today — word processing, e-mail, electronic research, and software for case management — have truly revolutionized the way the courts do business, improving their efficiency, accessibility, quality of decision-making, and helping them to keep pace with the ever-increasing complexity and volume of case filings.

In the mid-1990's, yet another innovative technological advance appeared that promised still more benefit for the legal and court communities — electronic filing of court documents. This technology offered the potential for more rapid filing and service of papers; round-the-clock access to court documents; reduction in paper handling, service, and storage costs; and greater protection against loss and destruction of important documents. In the vanguard among those exploring this potential were the federal courts, which began pilot programs in 1996. Also showing interest were a few states and private vendors, who began their own experiments with electronic filing at around the same time.

In 1997, the New York State Unified Court System (“UCS”) began to explore the parameters of the new electronic filing technology for itself, closely examining the experience of other jurisdictions. The UCS appointed two advisory committees — one comprised of court-related personnel and the other of attorneys — to assist it in this review and in the development of a pilot program offering this service in the New York courts. Working closely with these two committees was a third advisory committee, the Chief Administrative Judge’s Advisory Committee on Civil Practice, which lent its substantial expertise in legislative and regulatory drafting to help develop the necessary legislation and regulations to get the pilot underway.

By 1999, the UCS sought authorization for a pilot program to test the efficacy of electronic filing of court documents in certain selected cases: *i.e.*, cases filed in the Commercial Divisions of the Supreme Court of Monroe and New York Counties, and in the Tax *Certiorari* Part of the Supreme Court of Westchester County. The Legislature

provided this authorization through enactment of chapter 367 of the Laws of 1999 (a copy of which is attached as Appendix A). In doing so, however, it imposed certain special limitations on electronic filing. No case could be included in the electronic filing pilot without the written consent of all parties. Furthermore, the pilot program was scheduled to expire on July 1, 2002, and the Chief Administrative Judge was required to file a report with the legislative leadership, the Governor, and the Chief Judge by April 1, 2002, summarizing UCS experience with electronic filing and setting forth proposals for modification or expansion of the program in the future.

This report has been prepared in response to that mandate. It summarizes the experience of the UCS in implementing the "Filing by Electronic Means" (hereinafter sometimes referred to as the "FBEM") program over the past three years, and is comprised of six sections. This Introduction provides some background information on the development of electronic filing technology and the UCS interest in its capabilities. The second section discusses the advantages presented by use of this technology, while the third section summarizes the elements of the pilot program. The fourth section provides information on the actual operation of the program, including data on its use. The fifth describes present challenges to its success, devoting special attention to concerns about privacy issues. To this end, it provides a primer on current law in the area, and details steps the Chief Judge and Chief Administrative Judge have taken to address privacy and public access concerns. Lastly, the sixth section of this report sets forth the UCS recommendations on the future of the program. These recommendations principally call for elimination of the requirement that the parties consent to use of electronic filing; for extension of the pilot program for another three years; and for its expansion to other case types and locations over that time period.

II. Advantages presented by electronic filing

As the UCS surveyed the emerging experience with electronic filing in the late 1990's, it looked with particular interest at the federal court system's experience. The federal pilots began in 1996, when two initial prototypes were created: one in the Northern District of Ohio, which began receiving electronic filings over the Internet in asbestos cases, and the second in the Southern District of New York ("S.D.N.Y.") Bankruptcy Court, which commenced an experiment with electronic filing in a large Chapter 11 bankruptcy case - the Macy's reorganization. By 1999, the federal experiment had expanded to 20 courts, resulting in an average of 24,000 new cases filed each month. By that time, a few other state courts, such as the Delaware Court of Chancery, had begun to explore electronic filing possibilities as well, as had commercial vendors who might provide enabling software (*e.g.*, Lexis-Nexis, West Publishing and Andersen Consulting). These ventures, however, were well behind the federal courts in scope and experience. In fact, the Administrative Office for the United States Courts,

after looking at the commercially-available software in the field, decided that it was not sufficiently refined for the courts' purposes and created its own software, using a template initially developed by the S.D.N.Y. Bankruptcy Court.

In the experience of these early innovators, electronic filing offered many advantages to the bench, bar, and public alike. As articulated in a white paper prepared for the federal court system in 1997,¹ these included:

For litigants and the public:

- Easier filing and reduced costs, plus more flexibility in the time of filing (*i.e.*, filing and other access could occur from remote locations at any hour of the day);
- Concurrent and immediate access to the same case file;
- Remote viewing of documents through modem connections (attorneys would not need to leave their offices to find a document in a file);
- Reduced need for the filing of duplicate paper copies by attorneys;
- Increased public access to case files, including remote access;
- Improved availability of file information, with fewer lost or missing files or pleadings;
- Automated copying of documents, either at remote locations or at the court;
- A replacement medium for archival storage, supplanting microfilm; and
- Ability to view archived files without waiting for retrieval and reading of microfilm;

¹See, *Memorandum from Gary L. Bockweg*, Chief, Applications Management and Development Division of the Administrative Office of the United States Courts, to the United States Judicial Conference, "Electronic Case Files in the Federal Courts: A Preliminary Examination of the Goals, Issues, and the Road Ahead" (March 1997).

For judges and court staff:

- Immediate access to case documents in the courtroom;
- Portable, simultaneous, and 24-hour access to case files, both inside and outside the courthouse for judges and other court employees;
- Reduced file-handling, maintenance, and redundant copying;
- Reduced staff time needed for tasks including data entry, pulling and reshelving files, and copying documents for the public;
- Simplified archiving and file retrieval;
- Secured file integrity and reduction or elimination of misfiled papers due to automated editing and validity checks;
- Reduced time for dictation and retyping, because text of transcripts, pleadings, exhibits or briefs can be copied electronically and inserted directly into documents prepared by the court;
- Simple and quick transfer of case files among courts, chambers and court units;
- Reduced need for handling duplicate paper copies filed by attorneys;
- Enhanced quality control for both docket entries and file content;
- Reduced need to assist with public access to case files;
- Enhanced ability to share, annotate, and edit documents through the use of e-mail;
- Ability to perform full text searches within individual documents and across an entire file system;
- Potential savings in court office space derived from decreased need to warehouse hardcopy files; and

- Reduced or eliminated need for duplicate copies of files.

Attracted by the prospect of realizing such important benefits, the UCS determined to establish an electronic filing pilot in the New York courts. Through such a pilot, bench and bar could, in a controlled setting, gain valuable experience in the application of new technologies to court processes and inform future judgments concerning broader deployment of those technologies.

III. Elements of the UCS Pilot

Once the legislation authorizing the UCS pilot was enacted, both implementing regulations and software were needed to make it operational. The three advisory committees worked closely with a number of parties to draft the regulations² and to develop the software. These included: the Office of Court Administration Technology Division and Counsel's Office; bar associations, including the New York State Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Monroe County Bar Association; individual practitioners, including managing attorneys from major law firms in New York City who would be likely to use the FBEM system and who had experience with the S.D.N.Y. Bankruptcy Court and the E.D.N.Y. District Court systems; and other major institutional litigants, such as New York City and the State Attorney General.

The pilot was designed to explore the usefulness of electronic transmission of legal papers in three contexts: (1) filing the initiating papers required to commence a lawsuit with a court; (2) service of process upon adversaries for the purpose of obtaining personal jurisdiction over them; and (3) service of interlocutory papers between parties to litigation. It would operate in the Monroe County Supreme Court Commercial Division, the New York County Supreme Court Commercial Division, and the Westchester County Supreme Court Tax *Certiorari* Part.

General Details

The technical demands were minimal. No special gadgetry was required. The hardware and software needs for participation were designed to be so modest that most attorneys would already have all the technical wherewithal required in their offices.³

²See, 22 NYCRR 202.5-b (a copy of which is attached as Appendix B).

³To participate in the pilot, an attorney only needed a PC, an Internet browser, a scanner, and Adobe Acrobat software (costing about \$100), which would permit storage of documents in the "portable document format" (PDF), and enable transmission of the document over the Internet.

To participate in the pilot, a person would need first to register with the UCS as a designated “filing user.” *See* 22 NYCRR §202.5-b(d). All attorneys admitted to practice in New York State were eligible, as well as attorneys admitted *pro hac vice* for the purposes of an action. *Id.* §202.5-b(d)(1). Self-represented parties were eligible for filing user status as well. Once an attorney or party submitted a registration form (available through the appropriate court clerk), he or she would be assigned a password and a Personal Identification Number (PIN). *Id.*, §202.5-b(d)(3). These two items, when submitted together, would be deemed to constitute a participant’s electronic signature and, when employed, bind him or her as if he or she had physically signed the paper being transmitted electronically. *Id.*, §202.5-b(f).

Once registered and eligible to participate in the pilot, a filing user in a case qualifying for FBEM would simply need to draft the documents required for his or her lawsuit, using any conventional word processor, and submit them to the Internet website maintained by the UCS for that purpose.⁴ Documents could be transmitted in this manner at any time of the day or night.

Participation in FBEM need not originate with the commencement of the case. The parties to litigation commenced by conventional means, *i.e.*, with hard copies filed with the County Clerk and papers served personally upon an adversary, could at any time convert that litigation into an FBEM case. They could do this by submitting consents to FBEM by all parties to the court, which the latter then would have discretion to approve or disapprove. 22 NYCRR §§202.5-(b)(3), (b)(4); *see also, id.*, §202.5-b(c) [prescribing content of the consent to FBEM].⁵

⁴That website, located at <http://fbem.courts.state.ny.us>, could also be accessed through the UCS home page www.courts.state.ny.us, and the UCS electronic courts website <http://e.courts.state.ny.us>. The following illustrates generally how the system would work. In an instance where an attorney/filing user uses the system to file papers commencing his or her lawsuit, he or she first drafts those papers as if in preparation for their filing in hard copy. Instead of then visiting the County Clerk’s office, however, he or she need do no more than open the Internet browser on his or her office computer (or home computer, or any other computer having access to the lawsuit papers to be filed). After accessing the website noted above, and inputting his or her password and PIN, he or she would select the option denominated “commence an action or proceeding”; follow screen prompts to input any necessary background information, such as the filing user status and case caption, and then convert the documents to PDF form. Finally, the attorney would select the option to send the documents in PDF form electronically to the website. At that point, the papers will have been filed – without need for the attorney ever to leave his or her desk or even avail the services of anyone on his or her staff.

⁵Under the rules, parties wishing to consent to use of FBEM in an action must complete and file with the court a formal consent to FBEM. The consent shall include Internet e-mail addresses for each attorney of record for the filing party and, where a party is not represented by counsel, for the party himself or herself. It also shall evidence agreement to comply with the User’s Manual (prepared by the Chief Administrative Judge to regulate use of the pilot); shall indicate whether the parties have consented to service of attachments by e-mail; and shall stipulate that the parties have successfully exchanged test e-

Commencing an action by filing the initiating papers electronically

Cases included in the pilot (*i.e.*, commercial claims in the Monroe and New York County Supreme Court Commercial Divisions, and tax *certiorari* claims in the Westchester County Supreme Court) could be commenced either by traditional hard copy filing with the County Clerk or by electronic filing. Where electronic filing would be used, the papers transmitted must be accompanied by a completed credit card/debit card sheet authorizing the County Clerk to collect payment of the index number fee. 22 NYCRR §202.5-b(e)(3). Where papers were filed in this manner, they would be deemed to have been filed upon their receipt at the UCS website. *Id.*, §202.5-b(e)(4). Not later than the next business day, the County Clerk would confirm the filing by return e-mail, including with the confirmation an indication of the index number assigned to the case. *Id.* Once a paper was filed in this fashion, it would become available to all who access the website, unless a request for sealing a document were made, and so ordered by the court.

No other parties' consent was required before a party filed its initiating papers in a lawsuit electronically.⁶

Service of papers to obtain personal jurisdiction in an action or proceeding

Chapter 367 also authorized the use of electronic means for the purpose of securing personal jurisdiction over a party to a case. This, in addition to the traditional means of service for that purpose under Article 3 of the CPLR. *See* 22 NYCRR §202.5-b(g)(1). Service by electronic means in this context, however, would require the agreement of the receiving party. In practice, a party wishing to serve his or her adversary by electronic means would first contact the latter and ask for such agreement. Assuming it were given, the service could go forward. Under the implementing rules, the party receiving the service electronically then must, within 24 hours of service, e-mail the party effectuating service that it has been completed. 22 NYCRR 202.5-b(g)(1).

Service of interlocutory papers by electronic means

mail messages. 22 NYCRR §202.5-b(c).

⁶In all cases, whether commenced electronically or by traditional means, the County Clerk would, upon filing of the initiating papers, provide the filing party with a copy of a Notice Regarding Availability of Electronic Filing. 22 NYCRR §202.5-b(b)(1). The purpose of this Notice was to encourage parties to give consideration to use of FBEM in the further stages of the litigation. If the recipient filer were interested, he or she then would serve this Notice upon the other parties to the case, along with the initiating papers.

Under the pilot, service of interlocutory papers could be accomplished by electronic means, provided the serving party secured his or her adversary's consent to this process. With such consent, he or she then could file those papers electronically at the UCS website, from which he or she would receive an automatic, computer-generated confirmation of electronic filing. On the day of filing, the filer also must electronically send a Notice of Filing such papers to all e-mail addresses of record for the intended recipients of the papers. 22 NYCRR §202.5-b(g)(2). Forwarding this Notice constitutes service upon an adversary. The Notice must provide the electronic document number and title of the paper filed, together with the date and time the document was filed. Upon receipt of this notice, the receiving party then must access the UCS Internet site to obtain a copy of the actual paper that was filed. If the filing party prefers to utilize existing service methods, such as mail or personal delivery, after electronically filing the document with the court, he or she could still do so.

No electronic filing of discovery documents

The FBEM program does not embrace the electronic filing of discovery documents, which are often voluminous and sometimes sensitive in nature. Discovery materials are included only if the parties stipulate that they wish this to happen and the court, by order, concurs. 22 NYCRR §202.5-b(l).

Copyright, confidentiality, and proprietary rights of electronically-filed documents

Submissions pursuant to FBEM have the same copyright, confidentiality, and proprietary rights as paper documents. If a party, or even a non-party, is concerned about the potential abrogation of those rights in any action subject to FBEM, he or she may apply for an order prohibiting or restricting the electronic filing on the grounds that such materials are subject to copyright, trade secret or other privacy interests, and that electronic filing in the action is likely to result in substantial prejudice to those rights or interests. 22 NYCRR §202.5-b(m). Interestingly enough, in the two years that the pilot has been in operation, no one has requested that a document be sealed.

Judicial authority to disallow participation in FBEM

The implementing rules give the presiding judge in each case complete authority to disallow its conduct as an FBEM case. *See* 22 NYCRR §202.5-b(b)(2) [authorizing a judge assigned to a case in the FBEM pilot program to reject electronic filing for that case]; *id.*, §202.5-b(b)(5) [authorizing a judge to terminate or modify the application of electronic filing in a case at any time].

IV. Use of the UCS FBEM Pilot

The pilot began in the Monroe County Commercial Division in April, 2000, and was extended to New York County in November, 2000.⁷ Data showing use of the FBEM system since its inception are instructive. Although the absolute number of cases filed to date is not large — 21 as of March 28, 2002 in the New York County Commercial Division — the number of attorneys who have used the electronic filing pilot website and registered as filing users is significant, clearly demonstrating an interest in the program and in what it can offer. There have been more than 35,000 “hits” and more than 236 practice filings on the website. In addition, more than 300 lawyers have been issued user ID’s and passwords that will enable them electronically to file documents.

Moreover, the success of the broader electronic filing programs in the federal courts demonstrates the promise of electronic filing for all courts. As of March 1, 2002, 32 of the 196 federal courts are actually making use of such programs, with the remaining courts expected to join them by 2005. Implementation of those programs, coupled with the federal courts’ new case management software, is advancing rapidly. Groups of nine courts are scheduled to begin the implementation process every two months. Approximately 35,000 new cases are filed electronically each month.

Within the federal courts in New York State alone, the E.D.N.Y. District Court and the S.D.N.Y. Bankruptcy Court together have produced a total of 53,000 electronically filed cases by March, 2002. In the S.D.N.Y. Bankruptcy Court, electronic filing is mandatory for all filings. In the E.D.N.Y., where it is used for all case types except Social Security disability benefit appeals, participation is left up to judicial discretion. The federal courts in the Northern and Western Districts of New York are beginning to install the system, but it will not be operational until 2003.

The implementation of electronic filing in state courts nationally is not very advanced. While no truly precise data are available to show the extent of electronically-filed cases in state courts, since the number of participants in electronic filing start-ups changes rapidly, the best estimate is that there are approximately 100 pilot projects underway in state courts around the country. Implementation has taken place on a piecemeal basis, with some states developing their own systems and others contracting electronic filing out to private vendors. Most are only in a pilot phase. While many states, such as California, Missouri, Arizona and Colorado, have initiated some form of electronic filing pilot, these pilots are limited. For example, in California, there are pilot programs in the San Diego Superior Court in construction default cases and digital subscriber lines access cases; in Tulare County, for emergency restraining order applications in domestic violence and child abuse cases; and in San Francisco Superior

⁷Unfortunately, the pilot never began in Westchester County, due to problems with the County Clerk’s computer system.

Court for the state anti-trust case against Microsoft. At the same time, the courts for Los Angeles and Ventura Counties have just begun to explore the possibilities presented by the technology; while Orange County has suspended its proposed partnership with an electronic filing vendor, Westfile, due to serious technical challenges in integrating the necessary software with its own.

Similarly, in Missouri, the major electronic filing pilot, located in Shawnee County, is limited to civil filings for debt collection cases. In Arizona, electronic filing is somewhat more widespread, but the total number of pilot programs is limited to eight, most addressing small claims matters. Colorado is seeking to implement a statewide program but, at the moment, documents may be filed electronically only in selected civil, domestic, probate and water rights cases in approximately 30 courts. It is fair to conclude that electronic filing programs at the state level are still preliminary, although some progress is being made. A more detailed summary of the status of electronic filing projects in the state courts is set forth in the summary prepared by a consulting firm, WendyTech, which is attached as Appendix C.

To stimulate interest in and familiarity with the FBEM program, the UCS and bar associations have, from the outset, engaged in substantial outreach to promote electronic filing to the legal community — providing brief demonstrations, longer (two-hour) training courses for CLE credit, and presentations addressed to a variety of audiences describing the advantages offered by the system.

The UCS has provided three training sessions in Rochester for attorneys and paralegals in firms that practice in the Monroe County Commercial Division; two training sessions for the court staff and the tax *certiorari* bar in Westchester County; 13 training sessions at the courthouse at 60 Centre Street in Manhattan for attorneys and support staff, and two training sessions at individual firms. Judges and court staff have met with the litigation departments at a number of leading New York City firms to explain and demonstrate the system. These firms include: Cleary Gottlieb Steen & Hamilton; Solomon Zauderer Ellenhorn Frischer & Sharp; Dewey Ballantine; Sullivan & Cromwell; Leboeuf, Lamb, Green & McCrae; Willkie Farr & Gallagher; Skadden Arps Slate Meagher & Flom; Covington & Burling; Kramer, Levin, Naftalis & Frankel; and Blank, Rome, Tenzer & Greenblatt.

In addition, the courts have reached out to bar leaders, providing a summary of the program and a demonstration of its capabilities to members of the State Bar Commercial and Federal Litigation Section, the New York County Lawyers Association, the Association of the Bar of the City of New York, and the Dutchess and Monroe County Bar Associations. Recently, the Chief Judge and the Chief Administrative Judge sent a letter to the presiding partners of over 50 major commercial law firms in New

York City, urging them to participate in the FBEM program. The response to date has been encouraging.

Attorneys who have used the FBEM program have been uniformly enthusiastic about its capabilities. Paul Aloe, a partner with Rubin Baum, who has filed three pilot cases, stated to a *New York Law Journal* reporter in December, 2000, after he had filed the first FBEM case: "This is going to revolutionize the way cases are handled."⁸ He added, "Many people will probably not appreciate electronic filing until they use it, but once they do, they won't be able to imagine doing it any other way."⁹ Henry Kennedy, the Managing Attorney for Willkie Farr and Gallagher, recently told the same reporter that only the existence of the FBEM program allowed him to file a time-sensitive case shortly after the terrorist attacks on September 11, 2001, when the courts were physically closed.¹⁰ With Mr. Kennedy's colleagues scattered all over the city, working on their computers at home, the attorneys and paralegals were able to piece together the necessary documents to file the notice of petition and petition, and obtain proof that they had been received.

Kathleen Farrell, the Chief Clerk of the S.D.N.Y. Bankruptcy Court, told the same reporter that because of her court's electronic filing capability, they did not lose a single document as a result of the attacks, and litigants and court personnel were able to file and retrieve papers within two days of September 11th, even though the courthouse, located approximately four blocks from Ground Zero, was unable to open until the following Monday. They also were able to help attorneys whose offices were in the World Trade Center to recreate complete case files.

The activity on the website, the registration of more than 300 attorneys, and the level of attendance at demonstrations of the program at bar association and firm meetings, reveal that there is significant interest in the advantages that the electronic filing program offers. Nonetheless, participation in the program to date has fallen short of expectations. What explains this?

V. Impediments to the Broader Use of FBEM

As revealed through discussions with judges, attorneys, and others involved in the pilot, the primary impediment to the broader use of FBEM has been the mandatory consent requirement. This requirement permits attorneys to opt out of electronic filing

⁸See, Tamara Loomis, "Electronic Filing - Manhattan's Commercial Division Goes On Line," *New York Law Journal*, December 14, 2000, p. 5, col. 3.

⁹*Id.*

¹⁰See, Tamara Loomis, "Electronic Filing," *New York Law Journal*, January 24, 2002, p. 5, col. 2.

without first exploring the pilot or providing reasons why they cannot participate even in the limited universe of Commercial Division cases. Reasons given for not participating include a reluctance to try a new system for filing documents different from the existing process for paper cases; a discomfort or lack of familiarity with computer technology; or a concern about placing the details of their clients' disputes on the Internet — even if the paper file might otherwise be available for public review at the courthouse or if it is likely that it will find its way to the Internet by another means.¹¹

A. The Mandatory Consent Requirement

The Commercial Division judges in New York and Monroe Counties have informed us that when they encourage attorneys to convert an existing paper case to electronic status or to consider filing a new case electronically, they often find it difficult to get agreement among the parties. The requirement that all parties consent in writing before a case can be filed electronically thus presents a significant impediment to the advancement of the FBEM program. While one or more persons in a multi-party case may be enthusiastic about electronic filing, another party may simply refuse to participate, thereby preventing the creation of an electronic case. Also, as with virtually every issue in litigation, negotiating the consent can take on a life of its own. As a result, many cases for which electronic filing is appropriate never make it into the pilot program.

B. The Risk Averse Nature of the Legal Profession and the Fear of Technology

Attorneys will sometimes jokingly tell their friends that the reason they did not become doctors was their fear of blood, and go on to say that they did not become business persons because they were risk averse by nature. There may be real truth in this last statement. An attorney's job is to anticipate every possible problem that could affect a transaction or the conduct of litigation. With such a problem-seeking orientation, he or she often may be loath to try anything new — especially when dealing with a process as important as the filing of court papers. Although attorneys will readily admit that the existing process for the filing and service of paper documents can be time-consuming, expensive, and far from ideal, they at least know that process well, and may take comfort in its familiarity. At the same time, they likely worry that, whatever its merits, if they make a mistake using the electronic filing process, they might prejudice their clients' interests.

¹¹It bears noting that commercial services like e-law.com currently provide Internet access to case information and selected case records. To the extent that the court system can develop its own policy and protocols for providing Internet access to case records, it will be in a better position to do so if afforded the opportunity to truly test Internet access through an expanded and more flexible pilot.

In addition, like many other people, attorneys often fear technology with which they are unfamiliar. Although many, perhaps even most, attorneys may have mastered the use of word processing, computerized legal research, facsimile transmission of documents, and e-mail, not everyone feels fully comfortable around a computer. Concerned that a mistake in filing could create difficulties, many of the same attorneys may be loath to commit themselves to the electronic filing of critical documents. This, notwithstanding that more and more governmental and commercial functions are shifting to electronic communication and data exchange.¹² Nevertheless, while many federal and state agencies, such as the IRS and the New York State Department of Taxation and Finance, have accepted electronic filings for the past five years, attorneys are likely to continue in the paper filing mode until pushed to do otherwise, despite the cost, speed, and organizational advantages that electronic filing provides.

Aware of attorneys' reticence based on risk aversion and fear of new technology, the court staff and judges who have worked on the FBEM pilot have gone out of their way to assure potential participants that the process is "customer-friendly." Judge Thomas Stander, who presides over the Monroe County Commercial Division, tells all attorneys when he conferences cases that he and his staff will be as helpful and flexible as possible to encourage counsel who might want to try the electronic filing system to do so. Recently, Patricia Seely, an associate with Cusik, Hacker & Murphy in Latham, New York, told Tamara Loomis, the technology reporter for the *New York Law Journal*, that the courts were "amazingly accommodating" when she filed her FBEM case.¹³

The UCS stands ready to assist attorneys in utilizing the FBEM system by providing training programs, the opportunity to file practice cases on the FBEM website, and one-to-one assistance over the phone or in person.

C. Privacy/Public Access Concerns

Concern for the privacy of information contained in court documents posted on the Internet is probably *the* major reason given by attorneys who have attended training

¹²It is interesting to note that, last year, the Legislature sought to develop minimum privacy policies for New York State executive branch agencies that maintained websites for interaction with the public. The "Internet Privacy Policy Act" (L. 2001, c. 578) directed the Governor's Office for Technology to establish a model Internet privacy policy for all State executive branch agencies maintaining Internet websites. The need to establish such policies evidences the degree to which government is shifting toward the use of the Internet and electronic communications. However, the development of such policies is best informed by experience using the technology — hence, our request for more flexibility in the electronic filing pilot, so as to give the courts broader opportunities to confront and meet the privacy and other concerns that arise.

¹³See Loomis, *supra*, note 5.

sessions on FBEM, to explain their reluctance to file cases electronically. The UCS recognizes that this concern is a serious one. However, the need to address legitimate privacy concerns must be juxtaposed against the equally compelling interest in public access to court records and to the court system. To address the privacy/public access concerns involving *both* paper and electronic case records, Chief Judge Judith S. Kaye recently announced the appointment of a Commission on Public Access to Court Records (“the Public Access Commission”), chaired by the eminent First Amendment expert, Floyd Abrams, a partner at the law firm of Cahill, Gordon & Reindel.¹⁴ The appointment of the remaining members of the Public Access Commission will be announced shortly, and it is expected that the Commission will issue a report and recommendations by next spring.

In developing its policy, the UCS will consider the degree to which existing rules regarding public access to court records and limitations on such access apply without modification to electronic court records, and whether additional refinement or clarification is necessary or warranted. The traditional rule for public access to court records is that, unless otherwise restricted by law, court records are deemed to be open to the public. This right of access is afforded by New York State and federal common law, New York State statutes, court rules, and the United States Constitution. It is not an absolute right, however. Access may be limited to protect competing interests, such as the needs of law enforcement, the protection of proprietary interests such as trade secrets, and the protection of legitimate privacy interests. Indeed, a number of statutes and rules set limitations and provide guidance with respect to court records and proceedings that are deemed private or confidential.

Although the introduction of electronic and Internet access to court records warrants a close look at the privacy implications of having case records that may contain sensitive information available at a keystroke (and manipulable in ways not previously considered), both the public interest in open access to court records and the existence of statutory, regulatory, and judicial safeguards to limit access to sensitive

¹⁴The federal courts and other state court systems also are addressing these concerns. A special committee of the U.S. Judicial Conference has studied them for more than two years. It recently recommended that, in at least civil cases, access to electronic records in the federal courts be identical to that for paper records, with a few minor exceptions: *e.g.*, it would prohibit remote access to Social Security disability benefit appeals, owing to the sensitive information contained in those cases, and require that certain personal data identifiers such as social security numbers, financial account numbers, dates of birth, and names of minor children be modified or partially redacted by litigants so as to shield them from public view. Other state judiciaries in such states as Vermont, California, Maryland and Arizona have appointed blue-ribbon commissions to examine these questions as well. To assist state judiciaries, the National Center for State Courts, approximately one year ago, commenced a review of privacy/public access developments around the country, in order to formulate a set of proposed model access policies and regulations for state courts to consider by the fall of 2002.

information should be kept in mind. The following is a short primer on the law regarding public access to court records and competing privacy interests, which we hope will be helpful in sketching the contours of the public access/privacy debate.

Common Law and Statutory Rights of Access to the Courts

Both New York statutory and common law create a presumption that civil case records and proceedings are to be open to the public. Section 4 of the Judiciary Law requires the sittings of the courts to be public¹⁵; and sections 255 and 255-b of the Judiciary Law,¹⁶ the judiciary's analogue to the New York State Freedom of Information Law ("FOIL"),¹⁷ require that docket books and court records be public.

Numerous cases emphasize the value to be placed on open court proceedings and records. In *Westchester Rockland Newspapers v. Leggett*, the Court of Appeals summarized the many salutatory purposes that such openness offers in the context of a criminal case: *i.e.*, protecting the accused from "unjust persecution by public officials," insuring justice for the accused and "instill[ing] a sense of public trust in our judicial process."¹⁸ More recently, this view was echoed by the First Department in a civil case, *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*,¹⁹ where the *Washington Post* sought to obtain access to previously sealed court records in a commercial dispute involving the manufacturer of an abortifacient drug, RU-486, regarding its possible distribution and sale in the United States. The court noted that the public's interest in access to court proceedings and records often is as strong, or stronger, in civil cases than it is in criminal cases. Quoting from the Third Circuit's opinion in *Republic of the Philippines v. Westinghouse Electronic Corp.*,²⁰ Justice Tom stated: 'the bright light cast

¹⁵See, N.Y. Judiciary Law §4 (McKinneys 2002).

¹⁶See, N.Y. Judiciary Law §§255, 255-b (McKinneys1983). Section 255 provides that "[a] clerk of a court must, upon request, and upon payment of or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and documents in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found." Similarly, section 255-b requires that "[a] docket book, kept by a clerk of the court, must be kept open during the business hours fixed by law, for search and examination by any person."

¹⁷FOIL specifically excludes the judiciary from its ambit. N.Y. Public Officers Law, §§186(1), (3) (McKinneys 2001).

¹⁸48 N.Y.2d 430, 437 (1979). See also, *Anonymous v. Anonymous*, 158 A.D.2d 296, 297 (1st Dept. 1990); *New York Times v. Demakos*, 137 A.D.2d 247, 250 (2d Dept. 1988); and *Werfel v. Fitzgerald*, 23 A.D.2d 306, 312 (2nd Dept. 1965).

¹⁹274 A.D.2d 1 (1st Dept. 2000).

²⁰949 F.2d 653 (3rd Cir. 1991).

upon the judicial process by public observation diminishes the possibility for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.’²¹

The United States Supreme Court clearly has endorsed this view, stating that the sunshine provided by open access to court proceedings and records enhances trust and confidence in the judiciary by preventing secret government overreaching or abuse, and permitting all to see that the process used to resolve disputes is fair and even-handed.²² To foster such openness, in 1989, a new section 216.1 was added to the Uniform Rules for the Trial Courts (22 NYCRR §216.1), creating a presumption of public access to records filed with a court, and prohibiting sealing except upon a written finding of good cause.²³

The right to open court proceedings or records is not absolute, however. It may be limited by statute, regulation, court order, or common law to protect important competing interests. Thus, although sections 255 and 225-b of the Judiciary Law and section 216.1 of the Uniform Rules for the Trial Courts confer upon the public a right under New York law to inspect and copy court records, this right has been limited by numerous statutes providing for the confidentiality of records in certain matters, often to protect the privacy of the participants in such cases as matrimonial proceedings²⁴, proceedings involving children²⁵, and proceedings brought under the Mental Hygiene Law,²⁶ to state but a few.

Furthermore, the courts may, in individual cases, decide to seal all or part of a record, upon their own initiative or upon an application by a party. Section 4 of the Judiciary Law confers upon judges the discretion to exclude from public view matters in proceedings involving “divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy, or filiation.” Moreover, “[t]he inherent power of courts to control the records of their own proceedings has long been recognized in New York and this power does not depend on statutory grant but exists independently and ‘inheres in the very constitution of the court’” *In Re Dorothy D.*, 49 N.Y.2d 212 (1980) [citations omitted].

²¹274 A.D.2d at 7, quoting 949 F.2d at 660.

²²See, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 595 (1980).

²³22 NYCRR 216.1.

²⁴Domestic Relations Law §235 (McKinneys 1999).

²⁵See, e.g., Family Court Act §166 (McKinneys 1999) [providing that the records of proceedings in Family Court are not open to indiscriminate public inspection]; Domestic Relations Law §114 [providing for confidentiality of adoption records].

²⁶See, Mental Hygiene Law, Article 9, §33.13(c) (McKinneys 1996).

It should be noted that cases filed electronically in the FBEM pilot are subject to the same confidentiality rules as other cases. In addition, the regulations governing the FBEM program clearly state that a party seeking to seal an electronic record to protect copyright, trademark, or privacy interests may apply for a protective order sealing all or part of a document.²⁷

The federal courts similarly recognize a right of public access to court records. In *Nixon v. Warner Communications, Inc.*, the U.S. Supreme Court squarely recognized a federal common law right to access judicial records, stating that “[I]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”²⁸ However, as with New York jurisprudence, the right is not absolute. The Court observed that “[e]very court has supervisory power over its own records and files,” and that access should be denied where court files might become a vehicle for improper purposes, such as promoting scandal by revealing embarrassing information or serving as “reservoirs for libelous statements for press consumption.”²⁹

First Amendment Right of Access to the Courts

The First Amendment to the United States Constitution, designed to promote broad dissemination of information, has been interpreted to require basic openness in the functioning of the government. A line of Supreme Court cases holds that the First Amendment requires that government proceedings be open to the public, but all of those cases deal with access to aspects of a criminal trial. In *Richmond Newspapers, Inc. v. Virginia*,³⁰ a plurality of the Court held that the First Amendment guaranteed the public access to criminal trials.³¹ The Court later extended this right of access to jury selection³² and pre-trial proceedings in criminal matters.³³

Recognizing that the right of access to criminal proceedings is not absolute, the Court, in *Globe Newspaper v. Superior Court*,³⁴ held that a state may prohibit access to criminal proceedings if “the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”³⁵ In a subsequent case, *Press*

²⁷22 NYCRR 202.5-b(m).

²⁸435 U.S. 589, 597 (1978).

²⁹*Id.* at 598, 599.

³⁰448 U.S. 555 (1980).

³¹*Id.* at 575-78.

³²*Press Enterprise Co. v. Superior Court* (Press Enterprise I), 464 U.S. 501 (1984).

³³*Press Enterprise Co. v. Superior Court* (Press Enterprise II), 478 U.S. 1 (1986).

³⁴457 U.S. 596 (1982).

³⁵*Id.* at 607.

*Enterprise Co. v. Superior Court*³⁶ (“Press Enterprise II”), decided in 1986, the Court articulated a two-pronged test to be used to determine whether a First Amendment access right exists to aspects of a criminal trial: (1) whether the record or proceeding has “historically been open to the press and general public” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”³⁷

The Court has not gone on squarely to address whether the First Amendment right of access to criminal trials extends to civil proceedings, although several lower courts have taken this view. For example, in *Publicker Industries, Inc. v. Cohen*,³⁸ a case involving an attempt by two newspapers to gain access to a hearing at which confidential business information could be revealed in the context of a proxy fight, the Third Circuit held that the First Amendment provides the press and the public with a right of access to civil proceedings.³⁹ The party seeking to close a hearing to protect confidential information or to seal a transcript has the burden of “showing that the material is the kind of information that the courts will protect and that there is good cause . . .” [for the restriction].⁴⁰ In order to show good cause, one must prove that the disclosure will result in a clearly defined and serious injury to the party seeking to maintain confidentiality.⁴¹

Despite the evolution of a line of jurisprudence addressing public access to court proceedings, there is no Supreme Court ruling clearly speaking to whether the First Amendment requires access to court documents that form part of the record. A few courts have noted that the logic articulated by *Press Enterprise II* would seem to apply to at least some categories of court documents. The Seventh Circuit, in *In re Continental Illinois Securities Litigation*, held that there was a First Amendment right to a special litigation report prepared in connection with the shareholders derivative suit at issue.⁴² In *Associated Press v. United States District Court*,⁴³ the Tenth Circuit held that the First Amendment right of access to criminal trials also applies to pretrial documents and filings, because, in the court’s view “[t]here is no logical way to distinguish between pretrial proceedings and the documents filed in regard to them.”⁴⁴ This is an open issue which must be resolved by the Supreme Court in the future.

³⁶See footnote 26, *infra*.

³⁷478 U.S. at 8.

³⁸733 F.2d 1059 (3d Cir. 1984).

³⁹*Id.* at 1061, 1069.

⁴⁰*Id.* at 1070.

⁴¹*Id.* at 1071.

⁴²732 F.2d 1302, 1316 (7th Cir. 1984).

⁴³705 F.2d 1143 (4th Cir., 1984).

⁴⁴*Id.* at 1145.

The Constitutional Privacy Right

The United States Supreme Court has held that the government has an obligation to protect privacy where it possesses personal information in government records. In the leading case, *Whalen v. Roe*,⁴⁵ the Supreme Court addressed whether the right to privacy established in *Griswold v. Connecticut*,⁴⁶ *Eisenstadt v. Baird*,⁴⁷ and *Roe v. Wade*,⁴⁸ relating to decisions about one's body, sexual conduct and health, extended to issues involving personal information. In *Whalen*, the issue was whether a record-keeping system devised by New York State to keep track of prescriptions for addictive drugs infringed upon a citizen's right of privacy in certain personal information. The court declared that the constitutionally-protected right to privacy extended to two types of interests: (1) "decisional privacy," defined as "independence in making certain kinds of important decisions;" and (2) "informational privacy," defined as the "individual interest in avoiding disclosure of personal matters."⁴⁹ Tellingly, the Court then went on to comment: "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data based on other massive government files The right to collect and use some data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures [I]n some circumstances that duty has its roots in the Constitution."⁵⁰

The Court underscored its decision in *Whalen* by holding in *Nixon v. Administrator of General Services*⁵¹ that President Nixon had a privacy right in records relating to his private communications with his family. Since then, however, the Court has done little to provide further elaboration of a constitutional right of informational privacy. Interestingly, the Court did note, in a later case dealing with a request by journalists for access to a defendant's FBI rap sheet pursuant to the federal Freedom of Information Law, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,⁵² that a person had a legitimate privacy interest in information that is publicly available by other means, but is "practically obscure." However that case dealt only with the interpretation of the "personal privacy" exception to the federal FOIL.⁵³

⁴⁵429 U.S. 589 (1977).

⁴⁶381 U.S. 479 (1965).

⁴⁷405 U.S. 438 (1972).

⁴⁸410 U.S. 113 (1973).

⁴⁹429 U.S. at 599-600.

⁵⁰*Id.* at 605.

⁵¹433 U.S. 425 (1977).

⁵²489 U.S. 749 (1989).

⁵³*Id.* at 762-764.

In sum, while courts have set forth the general parameters for addressing the tension between the public access versus privacy interests in context of court records and proceedings, there remains much room for discussion, discretion, and policy development. The time is ripe for a thorough review of the privacy/public access debate in New York. The Public Access Commission, comprised of stakeholders representing a full range of views in the privacy/public access debate, will provide the UCS with recommendations to help ensure transparency with respect to court records yet protect legitimate privacy interests for all types of cases. That examination will be more productive and meaningful if the courts have a broader base of actual experience with electronic filing and the placement of case records on the Internet. This can best be facilitated through an expansion of the FBEM pilot and the introduction of greater flexibility in its implementation.

VI. Reauthorization and Expansion of the FBEM Pilot until July 1, 2005

After careful study of the ongoing pilot program and extensive consultation with bench, bar, technology experts, and others in New York and in other jurisdictions, the UCS proposes to modify and expand the pilot for three years commencing July 1, 2002. Attached, as Appendix D, is a draft of legislation that would implement our proposal.

The most important element of our proposal is its call for elimination of a requirement — part of the current pilot — for written consent by all parties to a case before it may be subject to electronic filing. As noted above, the mandatory consent requirement has significantly limited attorney participation in the program. Elimination of this requirement will free attorneys willing to participate in the program from having to negotiate to persuade their adversaries to participate as well. It will signal that electronic filing is encouraged in the designated pilot jurisdictions; and it also will give the UCS an opportunity truly to test the electronic filing process, to assess its limitations and strengths, and to evolve a suitable set of procedures to govern its use. In lieu of the mandatory consent requirement, we propose that, in the pilot jurisdictions, there be a presumption that cases will be filed subject to FBEM, absent a demonstration by a litigant and a determination by the judge that participation in the electronic filing program is not feasible or will impose hardship. To provide a framework for the uniform consideration of requests to opt out of the pilot, the UCS will issue appropriate guidelines and criteria for judges. These guidelines will include safeguards against imposing electronic filing in inappropriate cases and will set forth procedures and parameters for considering requests to opt out.⁵⁴

⁵⁴As the draft implementing legislation (*see* Appendix D) makes clear, litigants in courts participating in the electronic filing pilot will remain free to use existing procedures for commencing an action and for serving initial documents for purposes of establishing personal jurisdiction in an action.

We further propose that the pilot be expanded, with a focus on cases that are particularly well-suited for testing electronic filing. As noted earlier, the pilot has gained significant momentum in the Commercial Divisions in New York and Monroe Counties in recent months, and those programs certainly should continue. Along with them, we propose that the pilot include Commercial Division cases in all seven counties where a Commercial Division of Supreme Court is now or soon to be operational — Erie, Monroe, Albany, Westchester, Nassau, Suffolk and New York Counties.

The Court of Claims also is very well-suited for testing electronic filing. Its jurisdiction and procedures are fairly well-defined, and our initial discussions with the Clerk of Court of Claims, representatives of the Court of Claims' bar, and the Attorney General's office, indicate an active interest in exploring the benefits of electronic filing. We therefore propose that the pilot be expanded to include cases filed in the Court of Claims.

In the same way, tax *certiorari* cases also seem well-suited to electronic filing, and members of the tax *certiorari* bar have expressed an interest in electronic filing. We therefore propose that the Westchester County tax *certiorari* pilot be continued and that a similar pilot be undertaken to include tax *certiorari* cases in New York City.

Finally, we have had a number of requests from members of the tort bar for inclusion of Supreme Court tort cases in the electronic filing pilot. The tort attorneys most interested in electronic filing include those who handle complex multi-party or mass tort cases — in which electronic filing already has elsewhere been shown to be helpful in streamlining case management in myriad ways — and those practicing in relatively rural areas, where the filing and service benefits (*i.e.*, reducing travel and costs) of electronic filing are particularly appealing. Based on these requests, we propose that the pilot include selected (multi-party or mass) tort claims in Erie, Sullivan, and Suffolk Counties, as well as in New York City.

The elimination of the mandatory consent requirement and careful expansion of the pilot as proposed above will give the UCS an opportunity to test electronic filing and to examine and address any concerns about the process so that, at some future point, an informed determination can be made about whether and how to implement electronic filing more broadly.

That is, electronic filing will *not* be mandated for purposes of commencing a lawsuit or establishing personal jurisdiction. Once an action is commenced in a pilot jurisdiction, however, the judge may direct that the action will proceed electronically absent a sufficient showing that electronic filing is not feasible or presents hardship.

During the three-year term of the pilot, the Public Access Commission will deliver its final recommendations and the National Center for State Courts will issue formal guidelines and recommendations on access to state court records. This will inform the UCS as it seeks to implement its own guidelines governing public access to all state court records; and, because of their overlap with the next stage of the electronic filing pilot, will better help us to structure the pilot so that it can serve its overall mission to test the suitability of electronic filing in the New York courts. We believe that the final set of public access/privacy guidelines will further public trust and confidence in the judiciary; protect citizens' privacy interests; and provide consistency of treatment of court records throughout the state.

As all three branches of New York State government contemplate the future, it is clear that more and more business between State residents and their government will be done on an electronic basis. Currently, a resident can pay his or her taxes by electronic filing, renew a driver's license electronically, and even obtain copies of important records electronically. Computer-based interactive transactions provide individuals with rapid, cost effective access to government services from virtually anywhere.

We must recognize the future as it comes upon us, and take advantage of the many benefits that electronic filing offers. To understand the range of these benefits, we need go no further than to reflect upon recent experience with disaster recovery in New York City, which so dramatically reminds us of the fragility of paper records. Electronic records can be transmitted when a courthouse is closed or inaccessible, are vastly cheaper to store, and can be reassembled from an off-site storage area — immediately, if necessary.

We feel confident that, with continued outreach, training, and one-to-one assistance, the interest in electronic filing can only grow — especially since New York attorneys already are beginning to file electronic cases in significant numbers in federal courts in New York State and the UCS software is very similar to that employed by the federal courts. By permitting an expansion of the case types and locales for which electronic filing would be available, attorneys around the State will have an opportunity to sample the UCS system and experience its benefits for themselves.

Indeed, it is only if the pilot is permitted to move forward that the courts will be able to address practical problems and to confront the privacy/public access issues and other concerns that have been raised. Continuing to limit this pilot will not make the issues go away. It is inevitable that electronic filing will ultimately become the standard by which the business of the courts is conducted. With enactment of chapter 367 three years ago, New York took a first tentative step in this direction. The pilot must be continued and expanded if we are to draw meaningful lessons that will help us together

to shape the future of litigation in this State.

Part 2:

Report on the New York State Unified Court System Filing by Facsimile Transmission ("Fax") Pilot Program

In 1999, to facilitate the filing of court documents on a rapid basis, the New York State Unified Court System ("UCS") sought legislative authorization for a pilot program to test the use of fax filing in selected locations for certain types of cases. The Legislature authorized such a program through enactment of chapter 367 of the Laws of 1999, providing for filing by fax in the Commercial Divisions of the Monroe and New York County Supreme Courts, the Court of Claims, and the Suffolk County Supreme Court. The cases subject to fax filing were limited to commercial cases, tax *certiorari* claims, mental hygiene and conservatorship proceedings, and cases against the State of New York. The same legislation also authorized a second pilot program permitting electronic filing of court documents in cases selected. Our experience with the electronic filing pilot is summarized separately in Part 1 of this report.

Chapter 367 amended CPLR 304, dealing with the commencement of an action; CPLR 2101, dealing with the form of papers; CPLR 2103, dealing with service of papers; CPLR 8023, dealing with the payment of fees by credit card; and section 212(2)(j) of the Judiciary Law, also dealing with the payment of court fees by credit card.⁵⁵

The fax filing experiment has worked extremely well. A total of 7,781 cases were filed by fax during the course of the experiment, which began in May 2000 after the promulgation of implementing regulations.⁵⁶ During the course of the experiment, 1,978 cases have been filed by fax in the Court of Claims; 400 cases in the New York County Commercial Division, 30 cases in the Monroe County Commercial Division; and 5,403 cases in Suffolk County.

Attorneys have expressed to court personnel their satisfaction with the speed and convenience that filing by fax offers. A brief summary of the experiment in Suffolk County will be illustrative of the benefits that this technology can provide. The Suffolk County Supreme Court regularly processes applications under the Mental Hygiene Law from both public and private hospitals. During the term of the pilot, more than 300

⁵⁵A copy of the legislation is attached as Appendix A.

⁵⁶See 22 NYCRR 202.5-a (A copy of the fax regulations are attached as Appendix B.)

mental hygiene cases were handled by fax, giving the parties in these often urgent cases the ability to communicate with the court right away. Similarly, over 600 orders to show cause were filed in guardianship proceedings during that time period — 90% of them were filed by fax. In tax *certiorari* claims, over 4,600 filings were received during the term of the pilot, most of which made use of the fax machine.

The bar has indicated its satisfaction with this program and would like to see it expanded. Given the growing interest in the use of this technology to file or serve papers, the UCS is requesting that the fax pilot be reauthorized for three more years until July 1, 2005 and be expanded to permit fax filings in all Supreme Court and Court of Claims cases.

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STATE OF NEW YORK

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1999-2000 Regular Sessions

ASSEMBLY

March 24, 1999

Introduced by M. of A. WEINSTEIN, GRANNIS -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil practice law and rules and the judiciary law, in relation to authorization of pilot programs permitting use of facsimile transmission or electronic means to commence an action or special proceeding and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Section 304 of the civil practice law and rules, as amended
- 2 by chapter 606 of the laws of 1996, is amended to read as follows:
- 3 § 304. Method of commencing action or special proceeding. An action
- 4 is commenced by filing a summons and complaint or summons with notice.
- 5 A special proceeding is commenced by filing a notice of petition or
- 6 order to show cause and a petition. Where a court finds that circum-
- 7 stances prevent immediate filing, the signing of an order requiring the
- 8 subsequent filing at a specific time and date not later than five days
- 9 thereafter shall commence the action. For purposes of this section, and
- 10 for purposes of ~~[sections]~~ section two hundred three of this chapter and
- 11 section three hundred six-a of this ~~[chapter]~~ article, filing shall mean
- 12 the delivery of the summons with notice, summons and complaint, notice
- 13 of petition or order to show cause to the clerk of the court in the
- 14 county in which the action or special proceeding is brought or any other
- 15 person designated by the clerk of the court for that purpose together
- 16 with any fee required as specified in rule twenty-one hundred two of
- 17 this chapter for filing. Notwithstanding any other provision of law,
- 18 such delivery may be accomplished by facsimile transmission or electron-
- 19 ic means, as defined in subdivision (f) of rule twenty-one hundred three
- 20 of this chapter, where and in the manner authorized by the chief admin-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [] is old law to be omitted.

LBD08691-02-9

1 istrator of the courts by rule. At ~~[such]~~ the time of filing, the
 2 ~~[original and a copy of such]~~ filed papers shall be date stamped by [a]
 3 ~~the clerk of the court [clerk]~~ who shall file ~~[the original]~~ them and
 4 maintain a record of the date of the filing and who shall ~~[immediately]~~
 5 return ~~[the]~~ forthwith a date stamped copy, together with an index
 6 number, to the filing party ~~[who brought the filing]~~. Where filing is by
 7 facsimile transmission, the clerk of the court need only return dated
 8 stamped copy of the first page of the papers initiating the lawsuit,
 9 together with the index number. Where filing is by electronic means, the
 10 clerk shall, in accordance with rules promulgated by the chief adminis-
 11 trator, forthwith notify the filing party of the index number and the
 12 date and time of filing. A confirmation record produced by the filing
 13 party's facsimile machine or computer and an affidavit of filing by the
 14 filing party, shall be prima facie evidence that the filing party trans-
 15 mitted documents consistent with the date, time and place appearing on
 16 the confirmation record.

17 § 2. Rule 2101 of the civil practice law and rules is amended by
 18 adding a new subdivision (g) to read as follows:

19 (g) Service by electronic means. Each paper served or filed by elec-
 20 tronic means, as defined in subdivision (f) of rule twenty-one hundred
 21 three, shall be capable of being reproduced by the receiver so as to
 22 comply with the provisions of subdivisions (a) through (d) of this rule.

23 § 3. Paragraphs 5 and 6 of subdivision (b) of rule 2103 of the civil
 24 practice law and rules, paragraph 5 as amended by chapter 244 of the
 25 laws of 1990 and paragraph 6 as added by chapter 478 of the laws of 1989
 26 and as renumbered by chapter 244 of the laws of 1990, are amended to
 27 read as follows:

28 5. by transmitting the paper to the attorney by ~~[electronic means]~~
 29 facsimile transmission, provided that a facsimile telephone number ~~[or~~
 30 ~~other station or other limitation, if any,~~ is designated by the attor-
 31 ney for that purpose. Service by ~~[electronic means]~~ facsimile trans-
 32 mission shall be complete upon the receipt by the sender of a signal
 33 from the equipment of the attorney served indicating that the trans-
 34 mission was received, and the mailing of a copy of the paper to that
 35 attorney. The designation of a facsimile telephone number ~~[or other~~
 36 ~~station for service by electronic means]~~ in the address block subscribed
 37 on a paper served or filed in the course of an action or proceeding
 38 shall constitute consent to service by ~~[electronic means]~~ facsimile
 39 transmission in accordance with this subdivision. An attorney may change
 40 or rescind a facsimile telephone number ~~[or address designated for~~
 41 ~~service of documents]~~ by serving a notice on the other parties; or

42 6. by dispatching the paper to the attorney by overnight delivery
 43 service at the address designated by the attorney for that purpose or,
 44 if none is designated, at the attorney's last known address. Service by
 45 overnight delivery service shall be complete upon deposit of the paper
 46 enclosed in a properly addressed wrapper into the custody of the over-
 47 night delivery service for overnight delivery, prior to the latest time
 48 designated by the overnight delivery service for overnight delivery.
 49 Where a period of time prescribed by law is measured from the service of
 50 a paper and service is by overnight delivery, one business day shall be
 51 added to the prescribed period. "Overnight delivery service" means any
 52 delivery service which regularly accepts items for overnight delivery to
 53 any address in the state[-]; or

54 § 4. Subdivision (b) of rule 2103 of the civil practice law and rules
 55 is amended by adding a new paragraph 7 to read as follows:

7. by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule upon the party's written consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding.

§ 5. Subdivision (f) of rule 2103 of the civil practice law and rules, as added by chapter 461 of the laws of 1989, is amended to read as follows:

(f) Definitions. For the purposes of this rule:

1. "Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state;

2. "Electronic means" means any method of transmission of information between ~~two~~ computers or other machines designed for the purpose of sending and receiving such transmissions, and which ~~results in the fixation of~~ allows the recipient to reproduce the information transmitted in a tangible medium of expression[-];

3. "Facsimile transmission" means any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such documents.

§ 6. Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules authorizing an experimental program in which actions and special proceedings in supreme court may be commenced in the supreme court of Monroe, Westchester, New York, and Suffolk counties and the New York court of claims. Participation in this program shall be strictly voluntary, and will take place only upon consent. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules. The cases subject to filing by facsimile shall be limited to commercial claims, mental hygiene and conservatorship proceedings, tax certiorari claims, and claims against the state of New York. The cases subject to filing by electronic means shall be limited to those involving commercial and tax certiorari claims.

§ 7. The civil practice law and rules is amended by adding a new section 8023 to read as follows:

§ 8023. Payment of fee by credit card. Notwithstanding any provision of law to the contrary, a party may pay any of the fees specified in subdivision (a) of section 8018, subdivisions (a) and (c) of section 8020 and section 8022 of this article by means of a credit card or similar device; provided, however, notwithstanding any other provision of law, any party paying a fee hereunder in such manner also may be required to pay a reasonable administrative fee. The amount of such fee and the time and manner of its payment shall be in accordance with the system established pursuant to paragraph (j) of subdivision two of section two hundred twelve of the judiciary law.

§ 8. Paragraph (j) of subdivision 2 of section 212 of the judiciary law, as amended by chapter 805 of the laws of 1987 and relettered by chapter 316 of the laws of 1988, is amended to read as follows:

(j) Notwithstanding any provision of law, rule or regulation to the contrary, establish a system for the posting of bail in court and the payment of fines and court fees by credit card or similar device. In establishing such system, the chief administrator shall seek the assistance of the state comptroller who shall assist in developing such system

1 so as to ensure that such funds shall be returned to ~~the~~ any jurisdic-
2 tion which, by law, ~~is~~ may be entitled to them. The chief administra-
3 tor shall periodically accord the head of each police department or
4 police force and of any state department, agency, board, commission or
5 public authority having police officers who fix pre-arraignment bail
6 pursuant to section 150.30 of the criminal procedure law an opportunity
7 to have the system established pursuant to this paragraph apply to the
8 posting of pre-arraignment bail with police officers under his or her
9 jurisdiction.

10 § 9. Not later than April 1, 2002, the chief administrator of the
11 courts shall submit to the legislature, the governor and the chief judge
12 of the state a report evaluating the experiment authorized by this act
13 and containing recommendations for further legislation.

14 § 10. This act shall take effect immediately; provided, however, that
15 section 8023 of the civil practice law and rules, as added by section
16 seven of this act and the amendment to paragraph (j) of subdivision 2 of
17 section 212 of the judiciary law made by section eight of this act, and
18 the authority of the chief administrator of the courts to promulgate the
19 rules authorized by section 304 and paragraph 7 of subdivision (b) of
20 rule 2103 of the civil practice law and rules, as amended by section one
21 of this act and as added by section four of this act, respectively,
22 shall expire July 1, 2002 when upon such date the amendments made by
23 such sections of this act shall be deemed repealed and provided further,
24 however, that section six of this act shall expire and be deemed
25 repealed July 1, 2002.

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby add, effective immediately sections 202.5-a and 202.5-b of the Uniform Civil Rules for the Supreme and County Courts, relating to filing of Court papers by facsimile transmissions and by electronic means, to read as follows:

202.5-a Filing by Facsimile Transmission

(a) Application.

(1) The Chief Administrator of the Courts may establish a pilot program in which papers may be filed with the Supreme Court. The program shall be limited to commercial claims in the Monroe County and New York County Supreme Courts and tax certiorari, conservatorship, and mental hygiene proceedings in the Suffolk County Supreme Court.

(2) "Facsimile transmission" for purposes of these rules shall mean any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such document.

(b) Procedure

(1) Papers in any civil actions or proceedings designated pursuant to this section, including those commencing an action or proceeding, may be filed with the appropriate court clerk by facsimile transmission at a facsimile telephone number provided by the court for that purpose. The cover page of each facsimile transmission shall be in a form prescribed by the Chief Administrator and shall state the nature of the paper being filed; the name, address and telephone number of the filing party or party's attorney; the facsimile telephone number that may receive a return facsimile transmission, and the number of total pages, including the cover page, being filed. The papers, including exhibits, shall comply with the requirements of CPLR 2101(a) and section 202.5 of these rules and shall be signed as required by law. Whenever a paper is filed that requires the payment of a filing fee, a separate credit card or debit card authorization sheet shall be included and shall contain the credit or debit card number or other information of the party or attorney permitting such card to be debited by the clerk for payment of the filing fee. The card authorization sheet shall be kept separately by the clerk and shall not be a part of the public record. The clerk shall not be required to accept papers more than 50 pages in length, including exhibits but excluding the cover page and the card authorization sheet.

(2) Papers may be transmitted at any time of the day or night to the appropriate facsimile telephone number and will be deemed filed upon receipt of the facsimile transmission, provided, however, that where payment of a fee is required, the papers will not be deemed filed unless accompanied by a completed credit card or debit card authorization sheet. The clerk shall date-stamp the papers with the date that they were received. Where the papers initiate an action, the clerk also shall mark the papers with the index number. No later than the following business day, the clerk shall transmit a copy of the first page of each paper, containing the date of filing and, where appropriate, the index number, to the filing party or attorney, either by facsimile or first class mail. If any page of the papers filed with the clerk

was missing or illegible, a telephonic, facsimile, or postal notification transmitted by the clerk to the party or attorney shall so state, and the party or attorney shall forward the new or corrected page to the clerk for inclusion in the papers.

(c) Technical Failures

The appropriate clerk shall deem the UCS fax server to be subject to a technical failure on a given day if the server is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon of that day. The clerk shall provide notice of all such technical failures by means of the UCS fax server which persons may telephone in order to learn the current status of the Service which appears to be down. When filing by fax is hindered by a technical failure of the UCS fax server, with the exception of deadlines that by law cannot be extended, the time for filing of any paper that is delayed due to technical failure shall be extended for one day for each day in which such technical failure occurs, unless otherwise ordered by the court.

202.5-b Filing by Electronic Means

(a) Application

(1) The Chief Administrator of the Courts may establish a pilot program in which papers may be filed with the Supreme Court by electronic means (FBEM). The program shall be limited to commercial claims in the Monroe County and New York County Supreme Court Commercial Divisions, and tax certiorari claims in the Westchester County Supreme Court.

(2) "Electronic means" for purposes of these rules shall mean any method of transmission of information between computers or other machines, other than facsimile machines, designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression.

(3) An "action" for the purposes of these rules shall include a special proceeding.

(b) Designation of Actions Subject to FBEM

(1) In any case designated pursuant to this section, a party may commence an action by filing the initiating papers by electronic means with the County Clerk, or by filing a hard copy of those papers with the County Clerk. Upon such filing, the County Clerk shall provide the filing party with a copy of a Notice Regarding Availability of Electronic Filing in a form approved by the Chief Administrator. If that party desires that the action be subject to FBEM, the party shall serve the other parties with such Notice, together with the initiating papers.

(2) If all parties appearing consent to the use of FBEM, and a Filing User pursuant to subdivision (d) appears for each party, then the parties shall sign a Consent to FBEM satisfying the requirements of subdivision (c), and the party serving the Notice shall file that Consent with the court, together with a Request for Judicial Intervention. The Consent and Request for Judicial Intervention may be filed by electronic means. A judge who elects to participate in the FBEM pilot program shall be denominated a "participating judge," and upon the assignment of a participating judge, the clerk shall so notify the parties. If the

judge assigned does not wish to be a "participating judge" or orders that the action should not be subject to FBEM, the clerk shall direct the parties to file all papers, including any papers previously filed electronically, in hard-copy form. The assigned judge shall note on the initial Preliminary Conference Stipulation and Order form whether the action is subject to FBEM. No action shall be subject to FBEM until ordered by the court. All papers may be served and filed in hard-copy form in accordance with the Civil Practice Law and Rules until an action is subject to FBEM.

Upon an action being subject to FBEM, all papers shall be served and filed in accordance with this section.

(3) The parties may apply at any time for an order that an action be subject to FBEM by submitting a Consent by all parties to FBEM satisfying the requirements of subdivision (c), which application the court in its discretion may grant or deny.

(4) When an action becomes subject to FBEM, the court may direct that papers previously filed in the action be filed electronically.

(5) The court may terminate or modify the application of FBEM to an action at any time and may excuse a party from compliance with any provision of these rules in order to prevent prejudice and promote substantial justice.

(6) When a case subject to FBEM is removed from FBEM, in whole or in part, the clerk shall convert into hard-copy form those documents comprising the case file which had been received by FBEM.

(c) Consents to FBEM and E-Mail Addresses of Record

(1) The consent to FBEM shall state that the submitting parties consent to the use of FBEM in the action, including consent to be bound by the service and filing provisions in these rules, and shall set forth the Internet e-mail address of each attorney of record and each unrepresented party for the purposes of service and giving notice of each filing (the "E-Mail Addresses of Record"). The consent to FBEM shall further state that the parties agree to comply with the User's Manual approved by the Chief Administrator; whether the parties consent to service of attachments by e-mail; and that the parties have successfully exchanged test e-mail messages, specifying whether those messages were with or without attachments, with other parties consenting to FBEM at the E-Mail Addresses of Record.

(2) Each attorney of record and each unrepresented party may include up to three Internet e-mail addresses as E-Mail Addresses of Record for that attorney or party.

(3) The New York State Unified Court System Internet Site ("UCS Internet Site") shall include for each action subject to FBEM a current list of the E-Mail Addresses of Record maintained by the County Clerk and the Chief Clerk of the Supreme Court. Access to e-mail addresses may be restricted to prevent unwanted e-mail solicitations. Each attorney of record and each unrepresented party shall promptly serve notice upon all parties of any change in such person's E-Mail Addresses of Record, and shall promptly notify the appropriate clerks of such change, including identifying to the clerks each action subject to FBEM in which the e-mail address must be updated and confirming that such person has received test e-mail messages successfully from all persons who have consented to FBEM

in the action.

(d) Filing Users, Passwords and Other Attorney Information

(1) An attorney admitted to practice in the State of New York, or admitted pro hac vice for purposes of an action, may register as a Filing User of the UCS Internet Site. A party to an action subject to FBEM who is not represented by an attorney may register as a Filing User of the Internet Site for purposes of such action. Registration shall be by paper on a form prescribed by the appropriate clerk, which shall require identification of the action and the name, address, telephone number and Internet e-mail address of the Filing User. An attorney registering as a Filing User shall declare on the registration form that the attorney is admitted to the Bar of the New York State or admitted pro hac vice in the particular action. If, during the course of the action, an unrepresented party retains an attorney who appears on the party's behalf, the appearing attorney shall ask the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

(2) A Filing User shall notify the clerk immediately of any change in the information provided in the Filing User's registration.

(3) A Filing User shall be issued a User Identification Designation ("User ID") and a password by the appropriate clerk upon registration. The clerk shall maintain a confidential record of issued User IDs and passwords.

(4) A Filing User shall maintain as confidential, except as provided in subparagraph (6), the User ID and password issued by the clerk. Upon learning of the compromise of the confidentiality of either the User ID or the password, the Filing User shall immediately notify the appropriate clerk, who shall issue the user a new User ID or password as appropriate.

(5) The clerk may at any time issue a new User ID or password to any Filing User. A Filing User may at any time obtain a new User ID or password upon request to the clerk by following procedures prescribed by the clerk.

(6) A Filing User may authorize another person to file a paper using the User ID and password of the Filing User, and the Filing User shall retain full responsibility for any paper so filed.

(e) Electronic Filing of Papers

(1) In any case subject to FBEM, all papers required to be filed with the clerk shall be filed electronically on the UCS Internet Site, except as expressly provided herein. Only a Filing User as defined in subdivision (d) may file papers under FBEM.

(2) Every paper filed electronically shall be signed for the purposes of Part 130 of the Rules of the Chief Administrator [22 NYCRR] in accordance with subdivision (f). The paper shall provide the signatory's name, address and telephone number.

(3) Whenever a paper is filed electronically that requires the payment of a filing fee, the papers shall include a separate credit or debit card authorization sheet and shall contain the card number or other information of the party or attorney permitting such card to be debited

by the County Clerk for the payment of the filing fee. The card authorization shall be kept separately by the clerk and shall not be a part of the public record. The Chief Administrator may permit other methods of paying filing fees from remote locations, such as electronic funds transfers and digital cash payments, and may provide guidelines for their use.

(4) Papers may be transmitted at any time of the day or night to the UCS Internet Site, and will be deemed filed upon the receipt of those papers by that Site, provided, however, that where payment of a fee is required, the papers will not be deemed filed unless accompanied by a completed credit card or debit card authorization sheet. No later than the following business day, the clerk shall transmit electronically to the sender a Confirmation of Electronic Filing. When papers initiating an action are filed electronically, an index number shall be assigned to the case and the number shall be transmitted to the filing party as part of the Confirmation of Electronic Filing.

(5) When a paper has been filed electronically, the official record shall be the electronic recording of the paper stored by the clerk. Such document also may be filed in hard-copy form with the appropriate clerk.

(6) A Filing User seeking to file electronically any paper that requires a judge's signature shall also transmit such document in hard copy form to the court. Orders signed by a judge shall be filed in hard-copy form, converted into electronic form by the appropriate clerk, and entered into the official record.

(7) A participating judge, by use of a password and participating judge designation issued by the clerk, may approve preliminary conference, scheduling, and other non-dispositive orders which shall be effective upon filing and issuance of an electronic notice of entry by the clerk.

(8) Nothing in the procedures for FBEM shall be interpreted to permit access to material filed under seal except upon order of the court.

(f) Signatures

A paper filed or served electronically shall be deemed to be signed by a person (the "signatory") when the paper identifies the person as a signatory in compliance with paragraph (1), (2), or (3). The filing or service shall bind the signatory as if the paper were physically signed, and shall function as the signatory's signature.

(1) In the case of a signatory who is a Filing User, such paper shall be deemed signed regardless of the existence of a physical signature on the paper, provided that such paper is filed using the User ID and password of the signatory.

(2) In the case of a signatory who is not a Filing User, such as an affiant or a deponent, or who is a Filing User but whose User ID and password will not be utilized in the electronic filing or service of the paper, such paper must be physically signed by the signatory before it is filed. A Filing User who files or serves such paper represents that he or she possesses the executed hard copy of such paper and agrees to produce it at the request of a party or the court.

(3) A party may add his or her signature to a filed paper by signing and filing a Certification

of Signature for such paper in a form prescribed by the Chief Administrator. Such Certification shall provide the title, electronic filing index number, and date and time filed of the paper being so signed.

(g) Service on Parties Who Have Consented to FBEM

(1) An attorney or party seeking to effect service upon the opposing party to obtain personal jurisdiction may serve the party by any of the methods permitted by Article 3 of the CPLR, or may serve the party by electronic means if the party agrees to accept service by this method. A party that agrees to accept service by electronic means shall provide the serving party or attorney with an electronic confirmation within 24 hours of service that the service has been effected.

(2) An attorney or a party filing an interlocutory paper pursuant to the FBEM procedures shall, on the day of filing, send electronically a Notice of Filing of the paper to all E-Mail Addresses of Record. Such Notice shall provide the electronic docket number and the title of the paper filed, and the date and time filed, as set forth in the Confirmation of Electronic Filing received from the court. The party receiving the Notice of Filing shall be responsible for accessing the UCS Internet Site to obtain a copy of the paper filed. The electronic transmission of the Notice of Filing shall constitute service of the paper on the addressee. Proof of service shall be filed electronically with the court pursuant to the FBEM procedures, but such proof of service need not itself be served on other parties. Nothing in this section shall preclude a party from utilizing other service methods permitted by the CPLR.

(h) Service on Parties Who Are Added to the Case

(1) In an action subject to FBEM, initial service of papers on parties who are added to the case shall be in hard-copy form and shall include, in addition to the papers, a notice that the action is subject to FBEM. Responsive papers may be served in hard-copy form and shall include (i) a Consent to FBEM for purposes of the action, or (ii) a statement that the party does not wish to utilize the FBEM option and will file and serve all papers in hard-copy form. Papers served on a party that declines the FBEM option shall be served in hard-copy form.

(2) In an action subject to FBEM, a proposed intervenor or other person seeking relief from the court who is not a party may: (i) file a consent to FBEM procedures and thereby, upon being represented by or registering as a Filing User, become subject to FBEM procedures for such an application, or (ii) file or serve papers in hard-copy form, together with a statement that he or she does not wish to utilize the FBEM option.

(i) Electronic Filing Index

For each action subject to FBEM, the UCS Internet Site shall provide a sequentially numbered index of all papers filed with the court and shall note the entry of any order or judgment by the court, regardless whether such paper was filed electronically. The record of those filings and entries for each case shall constitute the Electronic Filing Index.

(j) Notice and Entry of Orders and Judgments

In an action subject to FBEM, the Clerk shall file electronically orders and judgments of the court in accordance with the procedures for FBEM, which shall constitute entry of the order or judgment. This shall not prevent the appropriate clerk from filing and maintaining a paper copy of such orders or judgments, in his or her discretion. At the time of the entry of an order or judgment, the clerk shall transmit by e-mail to the E-Mail Addresses of Record a notification that the order or judgment has been entered and shall make a note in the Electronic Filing Index of the transmission. Such notice by the clerk shall not constitute service of notice of entry by any party. A party may serve notice of entry of an order or judgment on another party by separately transmitting to the party to be served the notification received from the clerk, a copy of the order or judgment, together with an express statement that the transmittal constitutes notice of entry.

(k) Technical Failures

The appropriate clerk shall deem the UCS Internet Site to be subject to a technical failure on a given day if the Site is unable to accept filings or provide access to filed documents continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon of that day. The clerk shall provide notice of all such technical failures on the UCS Internet Site and by means of the UCS Internet Site status line, which persons may telephone in order to learn the current status of the Site. When filing by electronic means is hindered by a technical failure, a party may file with the appropriate clerk in hard-copy form. With the exception of deadlines that by law cannot be extended, the time for filing of any paper that is delayed due to technical failure of the UCS Internet Site shall be extended for one day for each day in which such technical failure occurs, unless otherwise ordered by the court.

(l) Electronic Filing of Papers No Otherwise Permitted to be Filed

In any action subject to FBEM procedures, the court may enter an order authorizing the electronic filing of discovery requests, discovery responses, discovery materials or other matter to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the court. In the absence of such an order, no party shall file electronically any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleadings or other filings with the court.

(m) Copyright, Confidentiality, And Other Proprietary Rights

(1) Submissions pursuant to FBEM shall have the same copyright, confidentiality and proprietary rights as paper documents.

(2) In an action subject to FBEM, any person may apply for an order prohibiting or restricting the electronic filing in the action of specifically identified materials on the grounds that such materials are subject to copyright or other proprietary rights, or trade secret or other privacy interests, and that electronic filing in the action is likely to result in substantial prejudice to those rights or interests. Unless otherwise permitted by the court, a motion for such an order shall be filed not less than five days before the materials to which the motion pertains are due to be produced or filed with the court.

Chief Administrative Judge of the Courts

Dated:

10/4/2001

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E-Filing Projects in the U.S.

Compiling a list of electronic filing projects is like painting a moving train. Assume the list below is outdated. Additions, corrections and updates are always welcome. E-mail them to me at wendytech@justice.com or wendytech@earthlink.net.

This list of U.S. e-filing court projects was first published in *E-Filing Report*, a newsletter from Glasser Legal Works, 150 Clove Road, Little Falls, NJ 07424, (800) 308-1700, www.glasserlegalworks.com. The U.S.-based projects and commentary were compiled in December, 2000 by Tom O'Connor, Director of Education & Training at Pacific Legal in Seattle. He can be reached at toconnor@pacificlegal.com.

At the beginning of 2001, Jim McMillan, the Director of the Court Technology Laboratory at the National Center for State Courts in Williamsburg, Va., compiled a list of e-filing projects. His findings are sprinkled throughout the states as bullet points. Jim can be reached at jmcmillan@ncsc.dni.us. The National Center for State Court's resource-rich e-filing Web site is online at <http://ctl.ncsc.dni.us>.

Federal courts

State courts

Selected electronic filing web sites

National litigation/other

Pilot projects no longer in operation

Federal Courts

A current list of federal courts using e-filing is located at www.uscourts.gov/cmecf/cmecf_court.html. Towards the end of 2001, federal courts accepting files electronically were:

U.S. District Courts

- California Northern District Court
- District Of Columbia District Court
- Michigan Western District Court

U.S. Bankruptcy Courts

- Alaska Bankruptcy Court
- Arizona Bankruptcy Court
- California Southern Bankruptcy Court

- Missouri Western District Court
- New York Eastern District Court
- Ohio Northern District Court
- Oregon District Court
- Wisconsin Western District Court
- Delaware Bankruptcy Court
- Georgia Northern Bankruptcy Court
- Louisiana Middle Bankruptcy Court
- Minnesota Bankruptcy Court (home-grown system)
- Missouri Western Bankruptcy Court
- New Mexico Bankruptcy Court
- New York Southern Bankruptcy Court
- North Carolina Western Bankruptcy Court
- Texas Western Bankruptcy Court
- Virginia Eastern Bankruptcy Court
- Washington Western Bankruptcy Court

The Administrative Office of the U.S. Courts estimates that by 2003, the federal courts will be halfway through the national rollout of their e-filing system, called CM/ECF, or Case Management/Electronic Case Files system. Most bankruptcy courts will have the system, and a fair number of district courts- too many to list here- will be in the process of implementing the federal system. Problems (sorry, "challenges") with imaging, exhibits and privacy remain.

State Courts

To jump ahead to the state you're interested in, click on its first letter below:

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

➤ **Arizona** (updated December 2000)

Electronic filing is becoming widespread in Arizona, one of the pioneers of e-filing. Two new federal Arizona courts are completely wired, with plans to plug in at least eight state courts in Maricopa County in 2001. Between state and federal implementations, there might be as many as 30 e-filing courts

statewide by the end of 2001.

The state committee studying e-filing standards has apparently dropped its support for a PDF standard and is now awaiting developments from the Legal XML group to see if that standard may be more appropriate. Maricopa County is, however, still leaning toward PDF as the standard, although Division 2 of the Court of Appeals is allowing filing in any format.

- Pima County Justice of the Peace Court, Arizona - Virtual People's Court - small claims filings from private citizens
- Court of Appeals - Division Two - pilot project

Some sites:

- Judicial Branch of the State of Arizona:
www.supreme.state.az.us/welcome.htm
- Annotated Bibliography on E-Filing, prepared by The Electronic Filing Team, Technology Task Force of the State Bar of Arizona (although dated November 1996, this document holds up very well--WRL):
www.superiorcourt.maricopa.gov/lawlibrary/docs/efile.asp

➤ **California** (updated September 2001)

September 21, 2001: The Orange County Superior Court and West Group, of Eagan, Minnesota, announced today that they were suspending their partnership, announced in April 1999, to develop an electronic filing program for the Court due to the significant technical challenges in integrating the various component products. These products include WestFile, middleware, case management and document management component systems. The project had been an ambitious attempt to attempt a completely integrated electronic filing and case management system. West Group had developed and completed the Web-filing portion of the pilot (WestFile), which had been working for more than a year. The Orange County Superior Court's case management system had been upgraded to provide the functionality of image-enabled integration between the case and document management systems. However, the Orange County Superior Court's model for electronic filing has required the full and seamless integration of the system components in order to enable the electronic receipt and processing of filings (both data and documents), and this was not achieved since the project was attempted in April 1999.

August 2001: Electronic filing and electronic service of process became mandatory for attorneys litigating DSL (Digital Subscriber Line) cases in San Diego Superior Court. Judge Charles R. Hayes

ordered the use of CourtLink's eFile service to streamline court filings in the County Court for Judicial Council Coordinated Proceeding (JCCP) No. 4151.

July 2001: San Diego Superior Court began accepting electronic filings in 69 construction-defect cases, using Courtlink. All San Diego Superior Court Construction Defect cases with trial dates after October 1, 2001, have been designated as mandatory e-filing cases. CourtLink's eFile is also used to provide electronic filing service for San Diego County Court's JCCP tobacco and firearms cases (JCCP 4042 and 4095, respectively).

December 2000: Domestic violence advocates in Tulare County can now file emergency restraining order applications, and domestic violence and child abuse claims for domestic violence victims over the Internet. A grant from the Tulare County Superior Courts funded technology by E-Filing.com, at www.e-filing.com, that allows a domestic violence victim to call an advocate, who then files the necessary form via the Internet.

Judge Stuart R. Pollak of the San Francisco Superior Court has ordered the electronic filing (via the CourtLink "eFile" system) of all documents in the Microsoft suit and related cases being heard in his court. The judge felt that e-filing was needed to increase court efficiency and to manage the volume of filings that might result from a lawsuit of this magnitude.

Both Los Angeles and Ventura Counties have released RFPs for electronic case management systems. Although neither RFP includes a request for e-filing, they both ask for the responding vendors to explain how its CMS solution can work with an e-filing system.

Since 1997 the U.S. District Court for the Northern District of California has required that all complaints and pleadings in securities class actions be filed with the Securities Class Action Clearinghouse, an electronic filing system accessible over the Internet and maintained by the Stanford University Law School. The full text of more than 2,000 complaints, briefs, orders, and other filings is now searchable online through the Clearinghouse. The site is <http://securities.stanford.edu>.

Finally, the California XML group is moving forward with proposed technical standards for e-filing. The standards were drawn up to act as the basis for electronic filing projects in California and were presented at a meeting in November. A second meeting to discuss the EFM-to-CMS API was held in Las Vegas the day before the ICM Electronic Filing Privacy & Public

Access Conference 2000. For more information, see the California XML site at www.legalxml.org/California.

- Alameda Superior Court-unlawful detainers-XML
- Orange County Superior Court-1996-SCT/West pilot 2nd generation
- Riverside Superior Court
- Sacramento Superior Court-small claims-XML
- San Bernardino Superior Court-civil filings-XML
- San Diego Superior Court
- San Francisco Superior Court - certain civil cases
- Tulare County Superior Court - domestic violence filings
- Ventura County Superior Court
- Yolo County Superior Court - civil cases

➤ **Colorado** (updated January 2001)

Colorado has been implementing electronic filing statewide, using the Courtlink system. The state is adding 21 Colorado counties during January 2001.

Colorado State Courts: www.courts.state.co.us/ct-index.htm

- CourtLink statewide rollout scheduled for completion 1/15/2001

➤ **Delaware** (updated January 2001)

The Superior Court of Delaware has adopted Rule 107(h), which allows parties to file briefs on hyperlinked CD-ROM disks. Notice of intention to so file must appear on the cover page of the hard copy, and the CD-ROM must contain images or text copies of all cited authorities. For more information, see the court site at <http://courts.state.de.us/superior/tech.htm#tech4>.

- CLAD - certain civil cases (started in 1991) - moving to CourtLink
- Court of Chancery - due diligence cases

➤ **District of Columbia** (updated October 2001)

Oct. 15, 2001: The District of Columbia Contract Appeals Board has launched an electronic filing project to streamline court filings, using Courtlink's system.

July 2001: A one-year e-filing pilot project began on May 1, 2001. Electronic filing is mandatory for all "Civil One" cases filed in Washington, D.C.'s Superior Court, which are mainly complex

litigation cases involving large firms. After a year, the court will consider the issues raised by e-filing, such as privacy, cost, and public access to public documents, as well as efficiency issues.

- Superior Court - civil mass tort cases

➤ **Florida** (updated May 2001)

Duval County is working with CMS vendor CCI-Maximus on a pilot project using that company's new e-filing product.

The Florida Association of Court Clerks & Comptroller has signed a five-year development deal with NIC to develop online access to official records, such as marriage and death certificates, deeds, mortgages, liens and other property records.

The Web-based Florida Integrated Public Telecom Access System (IPAS), one of the first such "one-stop shop" statewide systems, will enable businesses and citizens to conduct searches for records. IPAS will also enable online payment of such things as traffic tickets and child support. An index of all county records is scheduled to be online by the beginning of 2002.

On May 21, 2001, Chief Judge Donal R. Moran of Duval County Circuit Court in Jacksonville, Florida, mandated the use of electronic filing to manage the 4,000 complex asbestos cases that the court is handling.

➤ **Georgia** (as of August 2001)

The Georgia Courts Automation Commission pilot project is back online after a delay while the state Attorney General reviewed the proposed vendor agreements.

The Georgia Courts Automation Commission (Electronic Court Filing Interoperability Pilot Project) is online at:
www.gcacsite.com.

Update August 2001: The state court of Chatham County, Georgia, (Eastern Judicial Circuit) is using electronic filing for collection cases. There were problems at the outset, but now half of all collections are filed electronically. They are just installing imaging. See www.chathamcourts.org.

- Chatham County State Court - criminal cases and traffic fines
- Georgia State Interoperability Pilot-XML
- Fulton County Superior Court

- Fulton County State Court

➤ **Iowa** (as of December 2000)

The Judicial Branch of the State of Iowa has issued a Request For Proposal to provide the State Court Administrator with scanners, EDMS software, workflow software, and connectivity to deliver an Electronic Data Management System to the Judicial Branch. The RFP includes an e-filing component and expresses a desire to contract with a single vendor to provide both hardware and software. Responses were due by January 12. Twenty-five vendors have filed a Notice of Intent to Respond, including Gov24.com, E-Filing.com, SCT (with CourtLink answering the e-filing section), KPMG and Deloitte & Touche. The project is on a fast track for implementation with a pilot project scheduled to begin on March 5, 2001.

➤ **Illinois** (as of December 2000)

A committee of the Illinois Supreme Court has been set up to approve standards for e-filing pilot projects. The committee, headed by Judge Stephen Schiller, is currently awaiting passage of a specific e-filing enabling rule by the Illinois Supreme Court.

➤ **Kansas** (updated beginning 2001)

- Shawnee County, Kansas-1998-civil filings for debt collection

➤ **Maryland** (updated June 2001)

The Circuit Court in Prince George's County, Maryland initiated one of the first national electronic filing pilot projects in partnership with the National Center for State Courts and Andersen Consulting (now Accenture). The pilot, known as JusticeLink, was the first effort to prove the concept of electronic filing. See

www.ncsc.dni.us/NCSC/TIS/TIS99/electr99/JusticeLink/JUSTCOVER.HTM.

On June 14, 2001, Baltimore City will launch its first e-filing project, using Courtlink. Questions are being handled by Mike Dunn of Courtlink, at mdunn@courtlink.com.

➤ **Michigan** (updated January 2001)

The Washtenaw County Trial Court in Michigan allows attorneys

with its CMS vendor, ProWare.

- Traffic Citations / Minor Misdemeanor Citations:
 - Hamilton County Juvenile Court (Cincinnati) - under development
 - Hamilton County Municipal Court - under development
 - Licking County Municipal Court (Newark) - prototype complete
 - Circleville Municipal Court - planning stages
- Criminal / Delinquency Complaints:
 - Hamilton County Common Pleas Court - under development
 - Hamilton County Juvenile Court - under development
 - Hamilton County Municipal Court - under development
- Civil Actions:
 - Bedford Municipal Court - planning stages
 - Butler County Common Pleas Court (Hamilton) - planning stages
 - Cuyahoga Falls Municipal Court - planning stages
 - Franklin County Municipal Court (Columbus) - planning stages
 - Hamilton County Common Pleas Court - prototype complete
 - Hamilton County Municipal Court - prototype complete
 - Lyndhurst Municipal Court - planning stages
 - Mentor Municipal Court - planning stages
 - Parma Municipal Court - planning stages
- Court Orders:
 - Cuyahoga County Common Pleas Court (Cleveland) - journal entries - prototype complete
 - Hamilton County Municipal Court - remote warrants - prototype complete
 - Hardin County Municipal Court (Kenton) - journal entries - prototype complete
 - Universal Electronic Protection Order Initiative, Supreme Court / Attorney General - planning stages

➤ **Oregon** (updated beginning 2001)

- Electronic filing of pro se domestic relations in development (via XML document)
- Uniform Criminal Judgment as an XML document to DOC, in beta Jan 2001
- Hearing notices to DA in production (text document w/planned conversion to XML)

➤ **Pennsylvania** (as of December 2000)

The U.S. District Court for the Eastern District of Pennsylvania uses the MDL 1203 Web-based Docket and Document Delivery System to consolidate information about pending fen/phen litigation. The system's Web site provides access to "docket entries for every filing made in MDL 1203, the text of all documents filed by the Court and the Special Master, and the text of all attorney-filed documents that relate to 100 or more individual MDL 1203 actions."

Verilaw Technologies has announced new projects with the Pennsylvania Courts of Common Pleas of Erie, Lancaster and Delaware Counties. For more information, see: www.verilaw.com.

- Cameron County
- Philadelphia Municipal Court - unlawful detainers
- Allegheny County Prothonotary Court

➤ **Texas** (updated September 2001)

Bexar County District Court Clerk, Reagan E. Greer, has reportedly awarded an e-filing contract to Tiburon, Inc. of Salt Lake City. Target date for implementing civil e-filing is June 1, 2001.

Updated September 2001: Electronic filing is now mandatory for Judge Fred Edwards, of the 9th District Court in Montgomery County, Conroe, Texas, announced at the seventh Court Technology Conference (CTC7, Baltimore, August 2001) that he also uses e-filing as a threat: any divorce cases not settled in 60 days must convert to electronic filing. Because of privacy concerns and technology fears, he says, his family law docket clears itself in 60 days.

Starting in Jefferson County in 1996:

- El Paso 120th District Court
- El Paso 168th District Court
- El Paso 327th District Court
- Jefferson 136th District Court
- Jefferson 172nd District Court
- Jefferson 58th District Court
- Jefferson 60th District Court
- Jefferson Administrative Court
- Montgomery 284th District Court
- Montgomery 410th District Court
- Montgomery 9th District Court

➤ **Utah** (as of December 2000)

The 3rd District Court is in discussions with e-filing vendors to handle a series of asbestos cases currently being heard by that court.

A pilot project for pro se filers, using QuickCourt, is being replaced with an Internet-based forms system, due in part to long lines at the kiosks in libraries that offered the service.

- 3rd District pilot - criminal filings from county attorney
- Court of Appeals - close to completion - Notice of Appeal filing from the local Legal Defender Association.

➤ **Virginia** (updated September 2001)

Fairfax County Circuit Court has launched the first electronic filing pilot in Virginia. Both state law and the Rules of the Supreme Court of Virginia have been changed to allow for the electronic pilot. Sensei Enterprises, Inc. (www.senseient.com) developed the project. For more information, see: www.co.fairfax.va.us/courts/circuit/ecf.

- Fairfax County Circuit Court (January, 2001)
- Wise County Circuit Court

➤ **Washington State** (as of July 2001)

Seattle's King County court is on the verge of signing on to a pilot project with Courtlink Corp., which is headquartered in Bellevue, Washington.

Washington's federal bankruptcy court (the U.S. Bankruptcy Court for the Western District of Washington) is accepting filings electronically as it converts to electronic filing.

- Chelan County Superior Court, Wenatchee - civil cases

➤ **Wisconsin** (as of December 2000)

Milwaukee County Superior Courts is now using technology from E-Filing.com (www.e-filing.com) to allow court-certified domestic violence advocates to file emergency restraining orders over the Internet. A victim can call an advocate who then logs on and files directly over a secured Web site. In emergency situations, the electronic filing server sends an instant page to a court commissioner beeper. After getting the page, the commissioner

can log on and immediately approve a temporary restraining order, allowing police to step in and end a dangerous situation. The Milwaukee system also stretches beyond temporary restraining orders, allowing advocates to file domestic violence and child abuse claims for victims directly over the Web site.

- Milwaukee County Superior Court

Selected Electronic Filing Web Sites

- A list of Electronic Filing Vendors, from the National Center for State Courts:
www.ncsc.dni.us/NCSC/VENDOR/Excerpts/ELECFIL3.HTM
- American Bar Association Legal Technology Resource Center--Electronic Filing:
www.abanet.org/tech/ltrc/research/efiling
- Bradley J. Hillis, Internet Experiments in Electronic Court Filing: www.wolfe.net/~dhillis/efile/apptoc.htm
- National Center for State Courts' Electronic Filing Resources:
www.ncsc.dni.us/NCSC/TIS/TIS99/ELECTR99/Elecfil1.htm
- National Center for State Courts, JEDDI Homepage:
www.ncsc.dni.us/jeddi/jeddi.htm

U.S. Courts

- E-filing and the federal courts:
www.uscourts.gov (search for electronic filing)
- Courts.Net:
www.courts.net/efiling.htm
- Virtual Courthouse:
www.montyahalt.com

National Litigation/Other

- MDL 1203 Litigation
- Nationwide Vitamins Antitrust Litigation
- Pennsylvania Environmental Hearing Board
- Washington State Diet Drug Litigation

Pilot Projects No Longer in Operation

- Prince George's County, MD-1994-1996 -certain civil filings
- Pilot project - Arapahoe County, CO-1997-99
- Pilot Los Angeles Superior Court Project (1998)

AN ACT to amend the civil practice law and rules, the court of claims act and chapter 367 of the laws of 1999, in relation to authorization for pilot programs permitting use of facsimile transmission or electronic means to commence an action or special proceeding

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 7 of subdivision (b) of rule 2103 of the civil practice law and rules, as added by chapter 367 of the laws of 1999, is amended to read as follows:

7. by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule [upon the party's written consent]. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding.

§2. Paragraph (i) of subdivision a of section 11 of the court of claims act, as amended by chapter 435 of the laws of 1999, is amended to read as follows:

(i) The claim shall be filed with the clerk of the court; and, except in the case of a claim for the appropriation by the state of lands, a copy shall be served upon the attorney general within the times hereinbefore provided for filing with the clerk of the court either personally or by certified mail, return receipt requested, or, where authorized by rule of the chief administrator of the courts and upon consent of the attorney general [within the times hereinbefore provided for filing with the clerk of the court], by facsimile transmission or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, in such manner as may be provided by rule of court. Any notice of intention shall be similarly

served [personally or by certified mail, return receipt requested,] upon the attorney general within the times hereinbefore provided for service upon the attorney general. Service by certified mail, return receipt requested, upon the attorney general shall not be complete until the claim or notice of intention is received in the office of the attorney general. Personal service upon the attorney general shall be made in the same manner as described in section three hundred seven of the civil practice law and rules.

§3. Sections 6, 9 and 10 of chapter 367 of the laws of 1999 are amended to read as follows:

§6. Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules authorizing an experimental program in which:

(a) all actions and special proceedings in supreme court and all claims against the state of New York in the court of claims may be commenced [in the supreme court of] by and be subject to filing by facsimile transmission; and

(b) all claims against the state of New York in the court of claims and the following actions and proceedings in the supreme court in the following counties may be commenced by and be subject to filing by electronic means: (1) actions and proceedings for damages in tort, in Bronx, Erie, Kings, New York, Queens, Richmond, Sullivan and Suffolk counties, (2) commercial claims, in Albany, Erie, Monroe, Nassau, New York, Suffolk and Westchester, and (3) tax certiorari claims, in Bronx, Kings, Monroe, New York, Queens, Richmond and Suffolk counties [and the New York court of claims. Participation in this program shall be strictly voluntary, and will take place only upon consent].
Such rules may provide that the consent of the parties thereto to participation in this program

is not required, except that no party may be required to commence an action or special proceeding by filing by facsimile transmission or by electronic means, pursuant to section 304 of the civil practice law and rules, nor may any party be required to effect personal service by facsimile transmission or by electronic means, pursuant to article three of such law and rules. If consent to participation is not required, such rules must provide that, upon a showing that participation of a party to an action, special proceeding or claim otherwise subject to the program is not feasible or will result in hardship, the presiding trial judge shall exempt such party from such participation. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules. [The cases subject to filing by facsimile shall be limited to commercial claims, mental hygiene and conservatorship proceedings, tax certiorari claims, and claims against the state of New York. The cases subject to filing by electronic means shall be limited to those involving commercial and tax certiorari claims.]

§9. Not later than April 1, [2002] 2005, the chief administrator of the courts shall submit to the legislature, the governor and the chief judge of the state a report evaluating the experiment authorized by this act and containing recommendations for further legislation.

§10. This act shall take effect immediately; provided, however, that section 8023 of the civil practice law and rules, as added by section seven of this act and the amendment to paragraph (j) of subdivision 2 of section 212 of the judiciary law made by section eight of this act, and the authority of the chief administrator of the courts to promulgate the rules authorized by section 304 and paragraph 7 of subdivision (b) of rule 2103 of the civil practice law and rules, as amended by section one of this act and as added by section four of this act, respectively, shall expire July 1, [2002] 2005 when upon such date the amendments made by

such sections of this act shall be deemed repealed and provided further, however, that section six of this act shall expire and be deemed repealed July 1, [2002] 2005.

§4. This act shall take effect immediately.